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DEPARTMENT OF ECOLOGY

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January 2, 2007

Mr. Keith Klein, Manager
Richland Operations Office
United States Department of Energy
P.O. Box 550, MSIN: A7-50
Richland, Washington 99352

**Re: Final Determination Pursuant To the Hanford Federal Facility Agreement and
Consent Order (HFFACO) in the Matter of HFFACO Milestone M-91-42**

Dear Mr. Klein:

This letter follows expiration of the time allotted for HFFACO dispute resolution in this matter between the Washington State Department of Ecology and the United States Department of Energy. Ecology's Final Determination in this matter pursuant to HFFACO Part Two, Article VIII, Paragraph 30(D) is enclosed.

Sincerely,

Jay J. Manning
Director

cc w/enc:

Nick Ceto, EPA Region 10
Dave Bartus, EPA Region 10
Mark French, USDOE-RL
Matt McCormick, USDOE-RL
Ken Quigley, DFSH
Judy Vance, FFS
Rob Piippo, FHI
Gabriel Bohnee, NPT
Stuart Harris, CTUIR
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Mr. Keith Klein
January 2, 2007
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Environmental Portal
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bcc electronic w/enc:

Laura Cusack, Ecology
Jane Hedges, Ecology
Deborah Singleton, Ecology
Ron Skinnarland, Ecology

bcc w/enc: NWP Central File: M-91

bcc: NWP Reader File

FINAL DETERMINATION

Final Determination pursuant to the Hanford Federal Facility Agreement and Consent Order (HFFACO) in the matter of HFFACO Milestone M-91-42, and the treatment / certification of Hanford Site transuranic (TRU) and transuranic mixed (TRUM) wastes.

I. Introduction

This determination resolves a dispute under the HFFACO between the United States Department of Energy (DOE) and the Washington State Department of Ecology (Ecology). As such, this constitutes my Final Determination pursuant to HFFACO Part Two, Article VIII, paragraph 30(D). This determination has been made following review and consideration of Ecology's Administrative Record in this matter.

The specific matter in dispute concerns two requirements of the HFFACO M-91-42 milestone due on December 31, 2006.¹ Both requirements relate to treating contact handled transuranic mixed waste to meet certain requirements, or in the alternative, certifying that such waste is ready for shipment to a disposal facility in New Mexico. DOE has requested that the M-91-42 requirements be adjusted. Through this determination, Ecology is denying DOE's request.

II. Transuranic Waste at Hanford

The 560-square-mile Hanford site is located in south central Washington State. Since the 1940's, it has served as one of the federal government's key facilities in the United States' nuclear weapons complex. In doing so, its activities focused on the irradiation, production, and reprocessing of nuclear fuels to extract and purify weapons grade nuclear materials. Hanford's processes were dependent on the use of a wide array of chemicals. Examples of resulting waste streams include highly radioactive and hazardous liquid tank wastes, solid wastes contaminated with long-lived radioisotopes (transuranic waste [TRU]), wastes containing both long-lived radioisotopes and non-radioactive hazardous wastes (transuranic mixed waste [TRUM]), and hazardous wastes containing low-levels of radioactive contamination and non-radioactive hazardous substances (mixed low-level waste [MLLW]).

Since the close of the Cold War, the Hanford mission has focused on cleanup and achieving compliance with federal and state hazardous waste law. In documenting associated requirements, Ecology, DOE, and the U. S. Environmental Protection Agency (EPA) developed and approved the HFFACO. Issued initially in May of 1989, the HFFACO stands as an Administrative Order issued pursuant to Washington's Hazardous Waste Management Act (Chapter 70.105 RCW) and as an enforceable Federal Facility Cleanup Agreement pursuant to Section 120 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The HFFACO serves as the centerpiece document governing Hanford cleanup. Its terms are enforceable and binding on the Parties. Enforceable milestones and associated (non-enforceable) target dates are located at HFFACO Appendix D (Work Schedules).

¹ Although the milestone date for the requirements is December 31, 2006, the due date for the milestones has been extended day-for-day pending the resolution of this dispute. HFFACO Article VIII, paragraph 30(F). Therefore, the due date for the requirements now coincides with the date of this Final Determination.

The federal Waste Isolation Pilot Plant (WIPP) Land Withdrawal Act², which establishes WIPP as a national disposal facility for transuranic waste, defines transuranic waste as "waste containing more than 100 nanocuries of alpha-emitting transuranic isotopes per gram of waste."³ Such wastes are contaminated with radioisotopes having half lives greater than 20 years, and heavier than Uranium on the Periodic Chart of the Elements, e.g., Plutonium, Americium, and Curium.

TRU wastes generated over Hanford's operational history include items such as discarded equipment, soils, sludges, protective clothing, glassware, and other wastes resulting from DOE's defense activities. A significant volume of suspected TRU has been "retrievably stored" in shallow, unlined "burial ground" trenches at the facility.

DOE's "Record of Decision" for the Hanford Defense Waste Environmental Impact Statement⁴ selected its preferred alternative for the management of Hanford site retrievably stored and newly generated TRU wastes⁵: "Retrievably stored and newly generated TRU-contaminated solid waste will be retrieved, processed as necessary, and sent to WIPP for disposal." DOE has thus recognized that Hanford's burial grounds contain contact-handled and remote-handled TRU. It has also recognized that due to changes in the definition of TRU waste, some burial ground wastes would now classify as low-level waste (LLW).

DOE has also recognized that a portion of these stored TRU and LLW contain non-radioactive hazardous substances, and would designate under Washington's Hazardous Waste Management Act as regulated "mixed waste."⁶ For example, DOE has estimated that approximately 20% of retrieved TRU wastes currently stored at its Central Waste Complex would designate as TRUM waste. Similarly, DOE estimates that approximately 20% of retrieved LLW at the Central Waste Complex would also designate as MLLW.

III. Ecology efforts to bring DOE's Hanford TRUM treatment / certification into compliance with the HFFACO

The M-91 milestone series has a long and complex history. Starting in 1989 with the establishment of the M-33 Major Milestone, DOE agreed that by 1995 it would complete a site-wide systems analysis to determine the volume and nature of regulated expected to require treatment, storage, and/or disposal as a result of the cleanup of the Hanford site. Based on that

² The Waste Isolation Pilot Plant Land Withdrawal Act, (Public Law 102-579) October 1992.

³ Certain wastes are excluded from this definition, including high-level radioactive wastes, wastes determined by the Secretary of Energy and the Administrator of EPA as not requiring deep geologic disposal, and wastes otherwise approved for disposal by the U. S. Nuclear Regulatory Commission on a case-by-case basis.

⁴ Disposal of Hanford Defense High-Level, Transuranic, and Tank Wastes, Hanford Site, Richland, Washington: Record of Decision (ROD), U. S. Department of Energy, April 1988.

⁵ DOE's ROD also covered Hanford's 618-10 & 11 burial grounds, which it noted as "the only pre-1970 buried suspect TRU-contaminated solid waste site outside the [Hanford] central (200 Area) plateau".

⁶ Waste containing both radioactive and non-radioactive hazardous waste.

comprehensive analysis, it would submit an HFFACO change package proposing milestones for the acquisition of facilities necessary to treat, store, and dispose of those solid wastes and materials.

In 1995, DOE proposed and Ecology agreed that additional time for the development of such milestone schedules was appropriate. On December 31, 1996, the Parties signed HFFACO Change Package M-91-96-01, which established the M-91 series and a schedule for DOE to develop Project Management Plans (PMP) for specific waste streams. This change package also established requirements for the PMPs in Section 11.2 of the HFFACO Action Plan.

On June 28, 2000, DOE submitted its TRU/TRUM PMP and proposed HFFACO milestones. Ecology found significant deficiencies with both the plan and the proposed milestones. This started a long and complicated dispute. By 2003, disagreement about state authority over TRUM destined for disposal at WIPP caused the Parties to initiate negotiations at the Director of Ecology level. These negotiations included the Assistant Secretary of Energy for Environmental Management, the Director of Ecology, and the EPA Hanford Project Manager. From January through March of 2003, the Parties engaged in detailed negotiations in an effort to resolve the concerns related to the M-91 milestones. A significant issue was whether TRUM was subject to Resource Conservation and Recovery Act/Hazardous Waste Management Act Land Disposal Restrictions (LDR), specifically the storage prohibition that attaches to LDR restricted waste under WAC 173-303-140(2)(a). Those negotiations failed.

Independent of the M-91 negotiations, DOE issued an amended Record of Decision on September 6, 2002, in which it decided to send certain volumes of TRU (including TRUM) to Hanford for "interim storage." In March 2003, the state filed a lawsuit, *Washington v. Abraham*, in federal district court to enjoin these shipments. The state alleged that DOE had failed to undertake sufficient National Environmental Policy Act analysis before deciding to move the waste to Hanford, and that any off-site TRUM moved to Hanford would, once on site, be stored in violation of the LDR storage prohibition.

On March 10, 2003, the state issued a Final Determination on M-91 under the HFFACO dispute process. The Final Determination required DOE to revise its TRU/TRUM PMP by specific dates and provided language in the major milestone requiring DOE to maintain internal work schedules and directives consistent with the milestone requirements.

On April 30, 2003, Ecology issued an administrative order (No. 03NWPKW-5494) establishing schedules for retrieving "retrievably stored waste" (RSW); treating retrieved, stored, and newly generated transuranic mixed waste to meet LDR requirements (or, as an alternative to treatment, certifying that such waste meets WIPP waste acceptance requirements); and managing MLLW. DOE appealed or otherwise challenged the Final Determination and Ecology's order in separate administrative, state court, and federal court actions.

On October 23, 2003, the Parties entered into a settlement agreement to resolve the issues associated with DOE's appeal of Ecology's Final Determination and administrative order. The settlement agreement included a tentative HFFACO M-91 change package with enforceable schedules for:

1. The retrieval, characterization, and storage of RSW.

2. The treatment of MLLW.
3. The acquisition of facilities or capabilities to treat MLLW and TRUM wastes that are either remote-handled or in boxes and large containers.

Because the Parties still could not agree on whether the LDR storage prohibition applied to Hanford's stored TRUM, the tentative change package also included "contingent" milestones for the treatment or certification of TRUM. The final HFFACO change package incorporating these agreements was signed by the Parties in May 2004.

Because of the storage prohibition issue, the Parties agreed to make the yearly contact-handled TRUM (CH-TRUM) treatment/certification requirements contingent on the outcome of a summary judgment motion in the *Washington v. Abraham* lawsuit. In January 2005 the federal district court ruled in the state's favor, but the decision did not become final until the case was settled in January 2006. On February 8, 2006, DOE submitted a HFFACO change request (M-91-05-01), in accordance with the October 23, 2003, Settlement Agreement, to make the contingent milestone enforceable based on the district court's decision. On March 9, 2006, DOE appealed the decision to the Ninth Circuit Court of Appeals. The milestones remain enforceable.

History of this Dispute

In October 2005, DOE and Ecology started informal discussions related to requirements in M-91 as a whole, intending to reach resolution by December 2005. DOE was unable to meet the requirements of the "contingent" milestone due December 31, 2005. As discussions continued, it became apparent to Ecology that the discussions needed to extend beyond December 31, 2005, to give the parties the chance to review all the pertinent information regarding the TRU / TRUM program and the basis for the requested changes. From November 2005 through April 2006 the parties met bi-weekly to share information on the initial basis of the milestones, perceived changes, and new information. By mid-April 2006, the parties were still far apart on these milestone negotiations. Ecology notified DOE that it did not feel DOE had provided sufficient information to justify making most of the requested changes. Ecology suggested that if DOE wanted to continue discussions, it should submit a signed change request to initiate the formal HFFACO dispute process.

On April 17, 2006, Ecology initiated an inspection to document DOE's progress on TRUM certification and whether DOE was applying adequate resources and had increased its efforts to meet the December 2006 certification requirements. Through that inspection, Ecology reviewed DOE's data on processing rates, communications between DOE and Fluor Hanford (FH), and contract documents. Ecology concluded that DOE was not on a path to meet the December 31, 2006, TRUM certification requirements. In addition, DOE had not, as it had been asserting, increased its efforts to meet the milestone requirements.

On July 28, 2006, DOE notified Ecology that it had completed the December 31, 2005, requirement to certify 1,800 cubic meters of TRUM and identified actions taken to increase throughput and maintain as best as possible the M-91-42 certification rates. On August 24, 2006, Ecology notified DOE of the results of the April 2006 inspection. Ecology identified concerns that DOE had not met the requirements to certify 1,800 of TRUM by December 2005,

and it was not on track to meet the December 2006 TRUM certification requirements. Ecology also expressed concern that DOE had reduced the work scope deliverables for the Waste Receiving and Processing (WRAP) facility under the Project Hanford Management Contract (DE-AC06-96RL13200). In addition, DOE had reduced the scope of the Performance Incentives (PIs) associated with TRUM certification.

On September 29, 2006, DOE submitted a signed change request seeking to change many requirements of the M-91 milestone series. This change request was significantly different from any proposal discussed in the parties' earlier meetings and would require time to understand and negotiate a resolution. The change package was denied on October 13, 2006, and DOE initiated dispute on October 20, 2006. With the initiation of dispute, DOE asked for an extension of the dispute at the project manager level until January 31, 2007. Ecology notified DOE that it would not extend the entire dispute. Ecology was, however, willing to discuss how the parties could split the dispute and grant an extension for elements not associated with the December 31, 2006, requirements.

On November 9, 2006, Ecology issued a letter to DOE granting the extension for those elements not associated with the December 31, 2006, requirements and denying an extension for the December 31, 2006, requirements. Following discussion between Ecology and DOE, Ecology issued a letter on November 16, 2006, clarifying that any Statement of Dispute (SOD) regarding the December 31, 2006, M-91-42 requirements would be due on November 27, 2006.

On December 4, 2006, Ecology initiated another inspection to document the actions DOE and FH have taken to increase their certification capacity and meet the December 31, 2006, milestone.

On November 27, 2006, DOE delivered a SOD for the December 31, 2006, M-91-42 requirements. Ecology reviewed the SOD and found no new information or adequate justification for the requested changes. Interagency Management Integration Team representatives from Ecology, DOE, and EPA met on December 5, 2006, but could not agree on a resolution.

IV. Ecology's rebuttal of DOE's Statement of Dispute and proposed resolution

This dispute involves two requirements of the HFFACO M-91-42 milestone that were originally due on December 31, 2006, and are now due at the time of issuance of this Final Determination:

1. Treat to meet LDR requirements or certify to meet WIPP requirements a cumulative of 3,000 cubic meters TRUM.
2. If DOE chooses to certify in lieu of treatment, it may meet the volume requirements specified in this milestone for any given year by certifying CH-TRU or CH-TRUM, provided that all CH-TRUM in permitted storage as of December 31, 2002, is treated to meet LDR requirements or certified.

Changing Conditions and Good Cause

DOE asserts that certain changes, all of which were beyond its control, occurred in assumptions on which the above milestones were based. These assumptions relate to:

1. The condition of the containers to be retrieved.
2. The percentage of drums that would require repackaging for disposal at the Waste Isolation Pilot Plant (WIPP).
3. The amount of newly-generated transuranic waste available for certification.

DOE infers that "assumptions" regarding these matters were held by all parties at the time of the 2003-2004 negotiations and were considered when the milestone requirements were set. DOE argues that these changing conditions warrant Good Cause under Article XL of the HFFACO.

With regard to assumption 1, Ecology asserts that this assumption was never discussed in the 2003-2004 negotiations. The RSW has been stored below grade for more than thirty years. One of the major drivers for requiring DOE to remove this waste was that the integrity of the containers was highly suspect. In Ecology's Administrative Order No. 03NWPKW-5494, Ecology cited DOE's own documents, which stated inspections conducted in 1994 showed that "the majority of drums inspected (probably over three-fourths) had appreciable areas where paint had flaked off or corrosion begun." In addition, Ecology cited the fact that 20% of the drums inspected ultrasonically had measurable corrosion and one drum was found to be breached in two areas about 0.25 inch in diameter. This investigation reported a maximum corrosion rate of 2 mil/year. It was not unforeseeable that these containers would now, more than 10 years later, be in an unstable and deteriorating condition.

With regard to assumption 2, Ecology again asserts that this assumption was never discussed in the 2003-2004 negotiations. Furthermore, in its SOD, DOE does not document the "changing conditions," but only states that the number of retrieved drums that require additional repackaging is higher than originally anticipated. DOE does not quantify the original assumption, nor does it document the current situation.

With regard to assumption 3, DOE asserts that it planned on an additional 700 cubic meters of waste from Hanford's Plutonium Finishing Plant (PFP) that would not require repackaging and could be easily certified. Ecology agrees that there was discussion of this waste in the 2003-2004 negotiations, and in fact documented the assumption of newly generated waste from PFP and elsewhere. However, this volume was determined to add to the estimated volume of RSW and waste currently in storage in order to estimate the total volume of waste that would need to be certified. There was no discussion about what wastes would be easier or harder to certify. The fact remains, as DOE admits in its SOD, that "there is in fact enough waste in storage to meet the 2006 milestone for certification of TRUM, but it requires significantly more effort and resources to sort through and repackage"⁷ Again, DOE does not quantify "significantly more effort."

⁷ U.S. Department of Energy, Statement of Dispute (SOD) for Hanford Federal Facility Agreement and Consent Order (Tri-Party Agreement) Change Control Form M-91-06-01 Milestones M-91-00 and M-91-42, page 3, Transmittal letter 07-AMCP-0043, November, 27, 2006.

HFFACO Article XL discusses the concept of "Good Cause" and identifies circumstances justifying good cause for changing milestone requirements. Most of these circumstances are very specific and relate to unforeseeable weather events, acts of God, fire, war, insurrection, inability to obtain permits, and insufficient funds. DOE has repeatedly stated that its budget requests and appropriated funds have been adequate to assure compliance with HFFACO requirements. None of the specific circumstances of HFFACO Article XL apply. Even under these specific circumstances, DOE still must show that the events are "unforeseeable" or that delays occurred or will occur despite DOE exercising "reasonable diligence" to prevent them. (See HFFACO Article XLVII.) DOE has not supported the notion that these changes were unforeseeable or that DOE has exercised reasonable diligence to prevent delay in the presence of these changes.

DOE's actions to increase throughput

In DOE's July 28 letter,⁸ DOE identifies actions it has taken to increase throughput on certification rates. These actions include:

1. Going to two full shifts at WRAP in October 2004.
2. Starting one repackaging permacon unit in T-Plant canyon in July 2005.
3. Adding two more repackaging permacon units in T-Plant in June 2006.
4. Discussion of sending some TRU waste to another DOE site.

With regard to action 1, DOE did increase its operations at the WRAP facility to two shifts per day in October 2004. This was early in the program, just seven months after the milestone package was signed. This increase to two shifts occurred long before any concerns of missing the milestone were made known and represents the level of effort DOE expected was necessary to meet the milestone requirements. Ecology's concern is what DOE did in 2006 to increase its efforts when it was obvious it would not meet the milestone even with the two shifts operating at WRAP. DOE did not take any actions, or document that it took any actions, at this time to increase processing efficiency at the WRAP facility. In fact, in October 2006 and on the verge of missing the milestone, DOE dropped back to one shift per day. Certainly this action was not aimed at increasing throughput.

With regard to actions 2 and 3, DOE did provide three permacon units at T-Plant by June 2006. However, Ecology's recent inspection revealed that there are only two operating crews for these units. The third crew is for surveillance and maintenance activities. One crew is dedicated to processing TRU, and the second crew processes TRU about 50% of the time. These crews are operating 4 days a week, 9 hours per day. Each unit is typically down for maintenance 1 day per week. On average, the crew is actually repackaging waste for about 4 hours per day. While Ecology applauds DOE's actions to get additional permacon units, Ecology thinks there are additional actions DOE could take to make these operations more efficient. With three units available, DOE could theoretically be processing waste for a total of 120 hours per week. With only two operating crews, processing waste only 4 hours a day for 4 days per week, DOE is only getting 32 hours of waste processing time from these units. This is about 27% efficiency.

⁸ Letter (06-AMCP-0227) COMPLETION OF CERTIFICATION OF 1,800 CUBIC METERS OF TRANSURANIC WASTE TOWARD TRI-PARTY AGREEMENT MILESTONE M-91-42 REQUIREMENTS, from Keith A. Klein to Jane Hedges, July 28, 2006.

With regard to action 4, Ecology is pleased that DOE is discussing options with other sites. However, Ecology is confused that it could cost less to send Hanford waste to another site to be repackaged and then be returned to Hanford or sent directly to WIPP. It seems it would be less expensive to hire additional crews, work overtime, or otherwise better utilize the capabilities already available at Hanford.

DOE unilateral direction to contractor inconsistent with HFFACO

Section 11.4 of the HFFACO Action Plan requires DOE to maintain internal planning documents (baselines, multi-year work plans, and site-wide systems engineering control documents) consistent with the HFFACO. DOE has acted contrary to this requirement with respect to the December 31, 2006, M-91-42 requirements. DOE admits in its SOD that it changed the contractor's performance incentives (PIs) on more than one occasion as a result of the changing conditions discussed above. Table 1 shows a history of contract and PI changes starting in 2005. The issue of most concern to Ecology in this dispute is that DOE unilaterally, without notifying Ecology, changed its direction to the contractors. As early as March 2005, DOE reduced the requirements of the contract and performance incentives to volumes below the M-91 TRUM certification requirements.

Milestone M-91-42 requires DOE to certify a cumulative 3,000 cubic meters of TRUM by December 31, 2006. A letter from Fluor Hanford documents that "on March 25, 2005, FH and RL verbally agreed to a revised PI to ship 2,132 m3 of TRU by September 30, 2006."⁹ On September 12, 2005, that agreement was formally incorporated into the PI. In March 2006, while in the middle of discussions with Ecology about adjusting the milestone (and with Ecology not responding favorably), DOE again reduced the contract requirements, as well as the incentives, further below HFFACO milestone requirements. Ecology cannot accept that DOE was doing all it could to meet the December 31, 2006, M-91-42 requirements when the contractor was not given incentive, or even required by the contract, to meet the milestone requirements.

DOE argues that changing conditions outside the control of the contractor necessitated changes to the contractor's performance incentives. For instance, in Attachment 3 of FH-0501961A R1, FH requests an equitable adjustment due to DOE's failure to obtain WIPP approvals and supply adequate TRUPACT shipping casks.¹⁰ None of the documentation DOE supplies to justify changing the contractor's PIs, however, relates to changes in the three assumptions on which DOE maintains the December 31, 2006, M-91-42 requirements are based, and on which DOE based its SOD. On December 20, 2006, in preparing this Final Determination, Ecology identified this point to DOE and requested¹¹ it provide any documentation from the contractor requesting an equitable adjustment because of changes in any of the assumptions on which the December 31, 2006, M-91-42 requirements are allegedly based. No such information was provided.

⁹ Letter, (FH-0401789.3), IMPACTS RESULTING FROM INTERFERENCE PER PHMC SECTION H.33 DUE TO DELAYS IN APPROVAL OF WIPP CERTIFICATION AUDIT REPORTS AND FAILURE TO PROVIDE SHIPPING CAPACITY, from Mr. Ronald G. Gallagher to Mr. Keith A. Klein, June 14, 2005.

¹⁰ Letter (FH-0501961A R1), EQUITABLE ADJUSTMENT FOR MISSED GFS/I AND FUNDING LIMITATION IMPACTS, from Mr. Ronald G. Gallagher to Mr. Keith A. Klein, June 8, 2005.

¹¹ Email, from Laura Cusack to Mark French and Greg Sinton, December 20, 2006, 8:04 a.m.

Table 1. History of DOE Contract and Performance Incentive Adjustments

Date	Contract Modification NO.	Contract Deliverable (TRUM shipment or certification due September 30, 2006	Performance incentive Deliverable (TRUM shipment or certification due September 30, 2006	Incentive Amount
6/14/04	M205 ¹²	2,132 m ³	8 increments of 256 m ³ 2,900 m ³ cumulative	\$11.2 M \$1.5 M
7/20/05*	Letter: 05-PRO-0335 ¹³	2,132 m ³	6 increments of 256 m ³ 2,900 m ³ cumulative	\$11.2 M \$1.5 M
9/12/05	Letter: 05-PRO-0431 ¹⁴	2,132 m ³	6 increments of 256 m ³ 2,132 m ³ cumulative	\$11.2 M \$1.1 M
3/16/06	Letter: 06-PRO-0204 ¹⁵	2,132 m ³	6 increments of 256 m ³ 1,864 m ³ cumulative	\$11.2 M \$1.1 M
4/25 /06	M238 ¹⁶	1,732 m ³	6 increments of 256 m ³ 1,864 m ³ cumulative	\$11.2 M \$1.1 M

* Flour Hanford was paid performance incentive fee, through an equitable adjustment, for two increments never shipped.

V. Findings and Final Determination

I.

DOE failed to meet the requirements of M-91-42 in that it did not, by December 31, 2006:

1. Treat to meet LDR requirements or certify to meet WIPP requirements 3,000 cubic meters of TRUM.
2. Treat to meet LDR requirements or certify to meet WIPP requirements all the CH-TRUM in permitted storage as of 12/31/02.

¹² Amendment of Solicitation/Modification of Contract No. DE-AC06-96RL13200, M205, signed by Keith Klein, June 15, 2004.

¹³ Letter (05-PRO-0335), CONTRACT NO. DE-AC06-96RL13200 – EQUITABLE ADJUSTMENT FOR MISSED GFI/S AND FUNDING LIMITATION IMPACTS, from Mr. Keith Klein to Mr. R. G. Gallagher, June 20, 2005.

¹⁴ Letter (05-PRO-0431), CONTRACT NO. DE-AC06RL13200 – EQUITABLE ADJUSTMENT FOR MISSED GFI/S AND FUNDING LIMITATION IMPACTS, from Mr. Keith Klein to Mr. R. G. Gallagher, September 12, 2005

¹⁵ Letter (06-PRO-0204), CONTRACT NO. DE-AC06-96RL13200 – 2006 PHMC FEE INCENTIVES, from Mr. Keith Klein to Mr. R. G. Gallagher, March 16, 2006.

¹⁶ Amendment of Solicitation/Modification of Contract No. DE-AC06-96RL13200, M238, signed by David E. Stromberg, April 25, 2006.

As DOE became aware that the milestone requirements were in jeopardy, it did not respond adequately or in a manner sufficient to support completion of the milestone. To the contrary, DOE reduced contract requirements and performance incentives to well below the HFFACO milestone requirements. In doing so, DOE violated Section 11.4 of the HFFACO Action Plan by not maintaining internal planning documents and directives to the contractor consistent with HFFACO milestone requirements.

Consequently, in light of the Administrative Record and the findings outlined above, in order to resolve the parties' HFFACO dispute regarding milestone M-91-42, and in order to ensure the safe and timely treatment or certification of Hanford site transuranic and transuranic mixed waste, my final determination in this matter is as follows:

1. The existing M-91-42 milestones will not be revised as requested by DOE, but will remain enforceable as is.
2. DOE has missed the M-91-42 milestone requirement to certify 3,000 cubic meters of TRUM by December 31, 2006.
3. DOE has missed the M-91-42 milestone requirement to certify, by December 31, 2006, all CH-TRUM in storage as of December 31, 2002.
4. DOE shall direct its contractor to take necessary actions to improve performance and meet all future M-91 requirements.
5. Pursuant to HFFACO Article VIII, paragraph 30(I), DOE shall perform and complete all work necessary to comply with the terms of this Final Determination.

II.

In accordance with HFFACO Article IX, Ecology may issue stipulated penalties for each violation of the HFFACO. Ecology is not assessing stipulated penalties at this time. Potential penalties will accrue for as long as DOE is out of compliance with the identified M-91 requirements; i.e., until DOE has certified at least 3,000 cubic meters of TRUM and has certified all the CH-TRUM in permitted storage as of 12/31/02. Potential penalties will accrue at a rate of up to \$5,000/violation for the first week and \$10,000/violation for each additional week until DOE has completed these requirements. At the time DOE completes these requirements, Ecology will determine the final amount of penalties that may be assessed against DOE. In making that determination, Ecology will consider all the circumstances, including actions taken by DOE and FH in meeting these requirements as quickly as possible.